Ark Las Vegas Restaurant Corporation *and* Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Workers International Union, AFL-CIO. Cases 28-CA-14228, 28-CA-14228-2, 28-CA-14228-6, 28-CA-14228-7, 28-CA-14376, 28-CA-14463, and 28-CA-14543

December 16, 2004

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On September 25, 2001, the National Labor Relations Board issued its Decision and Order in this proceeding.[1] The Board found, inter alia, that the Respondent, Ark Las Vegas Restaurant Corp., violated Section 8(a)(1) of the Act by maintaining work rules forbidding its employees from "[r]eporting to property more than 30 minutes before a shift is to start or staying on property more than 30 minutes after a shift ends," and from "[r]eturning to the Company's premises, other than as a guest, during unscheduled hours."

Subsequently, the Respondent filed a petition for review of the Board's Order with the United States Court of Appeals for the District of Columbia Circuit and the Board cross-petitioned for enforcement. On July 11, 2003, the court denied enforcement of the Board's order with respect to the Respondent's aforementioned rules (30 and 45) and remanded the case to the Board for further proceedings consistent with its opinion.[2]

By letter dated December 11, 2003, the Board notified the parties that it had accepted the remand and invited the parties to file statements of position. Thereafter, the General Counsel, the Charging Party, and the Respondent filed position statements.[3]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the court's remand and the parties' statements of position and finds, for reasons explained below, that the Respondent's work rules violated Section 8(a)(1).

I. BACKGROUND

A. Relevant Facts

The Respondent is a tenant of the New York New York Hotel and Casino in Las Vegas, Nevada. The Respondent operates three restaurants, a food court, and an employee dining room inside the New York New York Hotel and Casino. At all material times, the Respondent's employee handbook included the following rules prohibiting early arrival, late departure, and returning to the premises:

> *Rule 30*. Reporting to property more than 30 minutes before a shift is to start or staying on property more than 30 minutes after a shift ends unless authorized by a supervisor.
>
> *Rule 45*. Returning to the Company's premises, other than as a guest, during unscheduled hours unless authorized in advance by management.

The handbook indicated that violation of the rules was unacceptable and could lead to disciplinary action "up to and including termination."

B. The Board's Original Decision

In its original decision, the Board adopted, without comment, the judge's finding that Rules 30 and 45 violated Section 8(a)(1) of the Act. The judge found that the terms "premises" and "property" were unacceptably ambiguous and, indeed, that the word "property," in "context appears to refer to the entire hotel, casino, outside grounds and parking lot complex." 335 NLRB at 1290. Because of the terms' ambiguity, and the failure of the Respondent to establish "valid business justification" for its rules, the judge concluded that, under *Tri-County Medical Center*, 222 NLRB 1089 (1976), the rules constituted an unwarranted intrusion on employees' ability to engage in Section 7 activities, in violation of Section 8(a)(1). 335 NLRB at 1290.[4] The Board adopted the

[1] 335 NLRB 1284.

[2] 334 F.3d 99 (D.C. Cir. 2003). The court enforced the Board's order in all other respects. The court affirmed the Board's findings that the Respondent committed numerous violations of Sec. 8 (a)(1) and violated Sec. 8(a)(3) by disciplining and terminating employees because of their union support.

[3] The Charging party has requested that we grant this case "related-case" status" with *New York New York*, 28-CA-14519 et al, which is also before the Board on remand from the United States Court of Appeals for the District of Columbia Circuit. See 313 F.3d 585 (D.C. Cir. 2002). The Charging Party's request is premised on the Board's need "to ensure that its decisions are consistent." We find it unnecessary to formally link these cases in order to ensure that our decisions are consistent, and we therefore deny the Charging Party's request.

[4] Although the judge specifically addressed the meaning of the term "property," which appears in Rule 45, but not 30, he apparently treated "property" and "premise" as being synonymous. Indeed, as stated by the court, "[t]he ALJ determined that the word "premises," as well as "the word 'property' in context appear[ ] to refer to the entire hotel, casino, outside grounds, and parking lot complex." 334 F. 3d at 109. As discussed below, the parties likewise treat Rules 30 and 45 as indistinguishable and address only whether they prohibited off-duty Ark employees' access to areas outside Ark's leasehold—including the surrounding hotel, casino, and parking lot.

judge's finding and ordered Ark to rescind the off-duty employee access rules. Id. at 1284, 1285.

C. The D.C. Circuit's Decision

On July 11, 2003, the U.S. Court of Appeals for the D.C. Circuit set aside the Board's order with respect to the Respondent's access restrictions and remanded this issue to the Board for further proceedings. The court agreed that if Ark's Rules 30 and 45 denied off-duty employees access to "the area *outside* Ark's leasehold—including the surrounding hotel, casino and parking lot,"[5] Ark had not established a sufficient business justification to support its access restrictions under *Tri-County*, and such rules were unlawful. However, because other provisions in the rules appeared inconsistent with such an interpretation, the court found it "doubtful that Ark's no-access rules actually barred off-duty Ark employees from the surrounding hotel, casino and parking lot—or even from Ark's public restaurants."334 F. 3d at 110. Specifically, the court noted that "[o]nly a few pages before the rules in question, the employee handbook states: 'All Ark Las Vegas employees are welcome to use the gambling facilities, when off-duty, at the Hotel. That is the explicit policy of New York-New York Hotel & Casino...All of our employees, likewise, are welcome to dine at our restaurant outlets.'" Id. at 110. Further, the court said that, "in two other cases involving the New York New York Hotel and Casino, decided just two months before the instant case, the Board found that New York New York 'permits, even encourages, off-duty employees of Ark to visit and patronize the casino and the restaurants in the complex, and to use routes open to the public...to enter or exit,' and that Ark employees are 'invited to spend off-duty hours using the facilities.'" Id. (quoting *New York New York Hotel, LLC*, 334 NLRB 762, 767 (2001), and *New York New York Hotel, LLC*, 334 NLRB 772, 778 (2001), enf. denied 313 F.3d 585 (D.C. Cir. 2002)). The court concluded that, based on the foregoing, "[i]t would be surprising if Ark's work rules were truly intended to bar its employees from accepting these express invitations made by both Ark and New York New York." Id. at 110. However, the court found that the Respondent was unable to "bring any clarity to the question" of what areas they covered. Id. at 110.

Because the court found that the Board "appears to have invalidated the rules based on a misunderstanding of their meaning, or at a minimum without considering the contradictory indications of their meaning described above," and because the parties' briefs did not clarify the issue, the court set aside the Board's Section 8(a)(1) finding and remanded the issue for further consideration and explanation. Id. at 111.

II. ANALYSIS

Having considered all of the relevant evidence, we reaffirm our finding, for the reasons set forth below, that the Respondent's Rules 30 and 45 violate Section 8(a)(1) of the Act.

As discussed above, the court agreed that the Respondent's access policy with respect to its off-duty employees, as set forth in Rules 30 and 45, would be invalid under *Tri-County* if that policy covered areas outside Ark's leasehold, including the surrounding New York New York hotel, casino, and parking lot. The court simply found that the Board's determination that the rules had such an unlawful reach was not explained, and appeared questionable in light of other rule language and that it was "doubtful that Ark's no-access rules actually barred off-duty Ark employees from the surrounding hotel, casino and parking lot." 334 F.3d at 110. Thus, the court found it unclear exactly what areas the rules did cover**.**

In light of the court's remand, and considering the record as a whole, we find, contrary to the Respondent and our dissenting colleague**,** that the language of the rules reasonably could lead employees to conclude that they were prohibited from entering areas outside Ark's leasehold, including the surrounding New York New York hotel, casino, and parking lot, during their off-duty hours, unless they were returning to the hotel as paying guests. At the very least, employees reasonably could be confused by the rules' use of the terms "property" and "premises." Any ambiguity in the rules must be construed against the Respondent as the promulgator of the rules[6] because Rules 30 and 45 do not meet the requirements set forth in *Tri-County*, we find that the maintenance of the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.

As set forth above, Rules 30 and 45 prohibit employees from reporting to the "property" more than 30 minutes before a shift is to start and from staying on the "property" more than 30 minutes after a shift ends and from returning to the Respondent's "premises" other than as a guest**,** during unscheduled hours unless authorized by the Respondent.

The employee handbook itself uses the terms "property" and "premises" on numerous occasions in different contexts. Taken as a whole, these references create an ambiguous message for employees as to the meaning of those terms. For example**,** the handbook's "employee

[5] 334 F.3d at 109. (Emphasis in original).

[6] *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998); *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

parking" section states that New York New York "customer parking areas are not available for employee parking unless you are visiting the property as a guest."[7] The term "property" here clearly refers to the entire hotel/casino complex, and not only to the Respondent's leasehold. The handbook's "workplace violence" and "work place searches" sections use terms such as "our property" and "our premises" and "Ark premises" to designate the areas where violence, stealing, drug use, and other inappropriate behavior are prohibited. Similarly, the handbook's "work rules" section also prohibits the possession of dangerous weapons "on Company premises, or while off the Company premises in the performance of job duties;" stealing guest, employee, or Company property, "including items found on the Company's premises;" taking liquor or food off "Company premises without authorization"; and "using vulgar or profane language toward a guest, supervisor, or fellow employee while on premises." By contrast, where a particular area is intended, the handbook specifically describes it. For example, the "smoking policy" section states that employees are permitted to smoke only in designated areas and specifically provides that "[s]moking in private offices, work areas, public areas or stairwells is prohibited."

These provisions contain general references to "property" and "premises," occasionally modified by the term "Company." The provisions appear at times to refer to the Respondent's property, but at other times to nonleasehold areas. In these circumstances, it is unclear whether the references to "property" and "premises" in Rules 30 and 45 were meant only to apply to the Respondent's leasehold areas, or were also meant to reach all areas of the hotel complex and not just the Respondent's interior areas.

The court found that if the references in Rules 30 and 45 to "property" and "premises" include all areas of the hotel and casino facility**,** then the rules clearly violate *Tri-County*. We find that employees could reasonably understand Rules 30 and 45 to refer broadly to the entire hotel property—and consequently to forbid them both to remain on, and return to, areas that otherwise would be accessible to them as off-duty employees. Further, as discussed, the judge noted that the word "property" in the "hotel-industry parlance" generally refers to the entire hotel, casino, outside grounds, and parking lot complex.[8] In these circumstances, we find that Rules 30 and 45 violate Section 8(a)(1) of the Act.

Although the dissent argues that the rules do not cover areas outside the Respondent's facilities, the rules do not explicitly exclude such areas. Further, contrary to the dissent, it is not clear that the Respondent's rules would apply only to the Respondent's own property. Since the Respondent operated on New York New York Hotel and Casino property, it would make sense for the Respondent to prescribe behavior for its employees on both its own leased premises and New York New York's premises, which employees were required to transverse to and from work**.** Indeed, the Respondent's employee handbook states that

> many of the policies in our handbook are in part the result of our tenancy at the New York-New York Hotel Casino. Employee entrances, parking, drug testing, name tags, conduct at the hotel while off and on duty are just some of the rules we have included as it relates to Hotel policies, not necessarily our policies.

Moreover, even if the Respondent, as the dissent maintains, did not intend for the rules to reach beyond the interior of the Respondent's property**,** that intent was not clearly communicated to the employees. See, e.g. *Lafayette Park Hotel*, supra, 326 NLRB at 828. Consequently, contrary to the dissent, employees could reasonably interpret Rules 30 and 45 as barring them from engaging in Section 7 activities in areas outside the Respondent's leasehold, including the surrounding New York New York Hotel, casino, and parking lot.

The court stated that because the employee handbook provides that off-duty employees are welcome to use the gambling facilities and to dine at the Respondent's restaurants, "[i]t would be surprising if Ark's work rules were truly intended to bar its employees from accepting these express invitations made by both Ark and New

[7] The Respondent maintained a separate parking area for employees who drove to work and provided shuttle buses to the Hotel.

[8] The Respondent argues that the word "premises" has been used by other hotel/casinos in their rules and the Board did not find the use of the word impermissibly broad or ambiguous. We reject this argument. The Board in the cases cited by the Respondent did not address the issue, presented here, concerning the meaning of the terms "property" and "premises." In *Santa Fe Hotel & Casino*, 331 NLRB 723 (2000), the Board found it unnecessary to rely on the judge's discussion of the Board's application of *Tri-County* to *Trump Plaza Hotel & Casino*, 310 NLRB 1162 (1993), and *Sears Co.*, 300 NLRB 804 (1990). The Board agreed with the judge, however, that there was no evidence of a rule banning off-duty employees' access to the facilities. As in the present case, the employer there invited off-duty employees to gamble, partake of entertainment events, and to eat and drink in bars and restaurants. However, contrary to the facts here, the judge noted that there was "no record evidence that Respondent ever maintained a published employment rule, prohibiting off-duty employees from remaining or returning to its facility." 331 NLRB at 728. *President Riverboat Casinos of Missouri*, 329 NLRB 77, 82 fn. 13 (1999), cited by the Respondent, is inapposite. The issue there concerned the validity of the employer's no solicitation rule.

York New York." 334 F.3d at 110. However, we find these provisions do not contradict the message that off-duty employees may not be anywhere on the hotel property except as paying guests. The issue the court raises is whether employees would understand that the term "guest" encompassed the individual's status as an "employee" with Section 7 rights. However, the Respondent's own rules are ambiguous as to the distinction between "off-duty employees" and "guests". The handbook's "Employee as Guest" section allows "off duty" employees to use the gambling facilities "at the Hotel. That is the explicit policy of New York-New York Hotel & Casino." That section also indicates employees are "welcome" to dine at the restaurants at a reduced price. Although this provision refers to "off duty" employees, it is clear that it is meant to apply to employees entering the premises as paying guests, and not to employees returning to the premises as non-paying, off-duty employees exercising Section 7 rights**.** Moreover, in the *New York New York*[9] cases cited by the court, New York New York argued that because Ark's off-duty employees were on the hotel and casino premises only as guests, comparable to the general public, they were prohibited from engaging in Section 7 activities on the hotel and casino property.[10] Thus, we find that those provisions reinforce the prohibition of Rules 30 and 45 by allowing the off-duty employees on the hotel and casino premises only if their status is that of paying customers, and not that of employees with Section 7 rights.[11]

We therefore find Rules 30 and 45 to be unlawfully overbroad because they did not meet the requirements set forth in *Tri-County*.[12] We would at best consider the rules to be ambiguous, as reasonably open to our interpretation as to the dissent's interpretation. Any ambiguity in the rules must be construed against the Respondent as the promulgator of the rules.[13] Accordingly, we reaffirm the Board's earlier finding that the Respondent violated Section 8(a)(1) by maintaining Rules 30 and 45 in its employee handbook.[14]

SUPPLEMENTAL ORDER

The National Labor Relations Board reaffirms its prior Order in relevant part and orders that the Respondent, Ark Las Vegas Restaurant Corp., Las Vegas, Nevada, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Maintaining a rule barring employees from the premises 30 minutes before their shift and requiring them to leave within 30 minutes after their shift.

(b) Maintaining a rule barring employees from returning to the premises, other than as a guest, during unscheduled hours.

(c) Telling employees that they must comply with an unlawful rule barring them from arriving on the premises more than 30 minutes before their shift begins and requiring them to leave within 30 minutes after their shift ends.

(d) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its rules contained in the employee handbook barring employees from the premises more than 30 minutes before their shift and requiring them to leave within 30 minutes of the time their shift ends, and barring employees from returning to the premises, other than as a guest, during unscheduled hours; and notify employees that the rules have been rescinded to the same extent that the unlawful rules were publicized.

(b) Within 14 days after service by Region 28, post at its restaurants and hiring offices in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional

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[9] 334 NLRB 762 (2001); 334 NLRB 772 (2001), enf. denied 313 F.3d 585 (D.C. Cir. 2002).

[10] 313 F.3d at 587**,** 590**.**

[11] The Respondent states that New York New York's asserted restrictions on the Respondent's employees' rights do not render *the Respondent's* rules unlawful. The issue here, however, as framed by the court's remand, is what employees would reasonably understand the rules to mean. As noted above, the Respondent's handbook specifically informed employees that some of its rules reflected New York New York's rules, since the Respondent was operating as a tenant on New York New York's property. Thus, it is not unreasonable for employees to assume that New York New York's rules against Section 7 activity on its property fairly reflect the meaning of the Respondent's rules concerning access to the property**.**

[12] Although the Respondent again contends that its rules serve legitimate business needs, we agree with the court that the Respondent's proffered business reasons for the rules do not justify the denial of access by off-duty employees to exterior nonworking areas of the Respondent's premises such as the hotel, casino, and parking lot.

[13] *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F. 3d 52 (D.C. 1999); *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

[14] In the Board's original decision, in addition to finding that the Respondent violated Sec. 8(a)(1) by maintaining Rules 30 and 45, the Board found that the Respondent violated Sec. 8(a)(1) by demanding that employee Ron Isomura comply with Rule 30. See 335 NLRB at 1292-1293. Because the court remanded the Board's determination that Rules 30 and 45 were unlawful, the court also remanded the Sec. 8(a)(1) finding regarding Isomura. See 334 F.3d at 106 fn. 3. Because we find that the maintenance of Rules 30 and 45 violated Sec. 8(a)(1) by demanding that Isomura comply with Rule 30.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board' shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.'

Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 13, 1997.

(b) Within 21 days after service by the region, file with the Regional Director a sworn certification of a responsible official on a form provided by the region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 16, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting.

Contrary to my colleagues, I do not find that the General Counsel has established that the Respondent violated Section 8(a)(1) of the Act by maintaining Rules 30 and 45 in its employee handbook.

Rule 30 prohibits employees from "[r]eporting to property more than 30 minutes before a shift is to start or staying on property more than 30 minutes after a shift ends, unless authorized by a supervisor." Rule 45 prohibits employees from "[r]eturning to the Company's premises, other than as a guest, during unscheduled hours unless authorized in advance by management."

This case involves only an attack on the facial validity of a rule. There is no evidence of unlawful application; indeed there is no evidence that any employee has been deterred from engaging in Section 7 activity. Thus, the rule is unlawful only if, hypothetically, we can say that the rule can reasonably be read as prohibiting Section 7 activity.[1] The Section 7 right involved herein is the right of employees to engage in Section 7 activity during their off-duty hours. That right exists only if such activity occurs outside of the Respondent's premises.[2] The Respondent's premises here are its restaurants. Thus, the issue is whether the rule, on its face, can reasonably be read to prohibit off-duty employees from engaging in Section 7 activity outside the restaurants. I conclude that the General Counsel has not shown that a reasonable employee would read the rule that way. That is, a reasonable employee would read the rules as being confined to the restaurants.

Rule 45 specifically refers to "the Company's premises". The Rule appears in the Respondent's handbook, and thus "the Company" is clearly the Respondent. Although Rule 30 refers to "property", the parties have treated the two rules synonymously. Thus, the term "property" refers to the "Company premises" mentioned in the other rule. Further, Rule 30 speaks of "reporting to" the property. The only property to which these employees "report" is the Respondent's property. Finally, matters relating to activities on property other than the Respondent's property are set forth in other provisions. These provisions encourage patronage, regulate parking, etc. The essential point, understood by any reasonable employee, is that Rules 30 and 45 pertain only to the Respondent's property, and other rules pertain to the property of others, i.e., the hotel and casino.

In sum, absent evidence of unlawful application, I would not seek to stretch these rules beyond their reasonable meaning. More specifically, in the absence of such evidence, I would not infer that a reasonable employee would read Rules 30 and 45 as prohibiting Section 7 activity outside the restaurants.[3]

Dated, Washington, D.C. December 16, 2004

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[1] *Adtranz ABB Daimler-Benz Transp. N.A. Inc. v.* NLRB, 253 F.3d 19 (D.C. Cir. 2001).

[2] *Tri-County Medical Center*, 222 NLRB 1089. Inasmuch as no party attacks the validity of that case, I shall accept it as the applicable law.

[3] Consistent therewith, I would find that the Respondent did not violate Sec. 8(a)(1) by demanding that employee Ron Isomura comply with Rule 30.

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain any rule which bars employees from our premises 30 minutes before their shift or requires them to leave within 30 minutes after their shift.

WE WILL NOT maintain any rule which bars employees from returning to our premises, other than as a guest, during unscheduled hours.

WE WILL NOT tell employees that they must comply with an unlawful rule barring them from arriving on the premises more than 30 minutes before their shift begins and requiring them to leave within 30 minutes after their shift ends.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind our unlawful rules contained in the employee handbook barring employees from the premises more than 30 minutes before their shift and requiring them to leave within 30 minutes of the time their shift ends, and barring employees from returning to our premises, other than as a guest, during unscheduled hours, and WE WILL notify employees that the rules have been rescinded to the same extent that the unlawful rules were publicized.

ARK LAS VEGAS RESTAURANT CORPORATION